



Office of the Attorney General

State of Texas

September 21, 1992

DAN MORALES
ATTORNEY GENERAL

Mr. John Aldridge
Walsh, Judge, Anderson, Underwood & Schulze, P.C.
P. O. Box 2156
Austin, Texas 78768

OR92-551

Dear Mr. Aldridge:

You ask whether certain information is subject to required public disclosure under the Texas Open Records Act, V.T.C.S. article 6252-17a. Your request was assigned ID# 15904.

The Abilene Independent School District (the "school district") received a request for information submitted in a bid proposal for a recently awarded contract. The requestor seeks "the financial records of LesMans Construction, Inc. that were furnished to you for the purpose of bidding for contracts to be awarded for the construction of multi-purpose buildings." You claim that the requested information is excepted from required public disclosure by Open Records Act section 3(a)(10). You also claim that the requested information is not "held" by the school district and is thus not subject to the Open Records Act.

The act does not ordinarily require a governmental body to obtain information that is not in its possession. Open Records Decision No. 445 (1986); 317 (1982). In some instances, however, the act applies to information collected or maintained by "outside" consultants or contractors. *See* Open Records Decision No. 462 (1987); *but see* Open Records Decision No. 445. The act applies to information held by outside parties where: 1) the information relates to the governmental body's official duties or business; 2) the consultant acts as agent for the governmental body in collecting the information; and 3) the governmental body has or is entitled to access to the information. Open Records Decision No. 462.

You advise as follows:

The financial records requested in the bid documents are submitted to the architect for review and analysis. The District

relies on the expertise of the architect in determining the financial responsibility of the competing bidders, and accepts the architect's conclusions as to which bidders are fiscally responsible. The financial records are not forwarded to the District, nor does the District seek access to such records. Indeed, in this instance, to forward the records in question to your office for review, the District had to first obtain them from the architect.

The bidders submitted the financial records to the architect in response to the school district's bid documents. Thus, the architect has possession of the records under the school district's authority, and not his own authority. The financial records are "collected . . . by" and "maintained . . . for" the school district and accordingly are subject to the Open Records Act.

We now consider your assertion that it is excepted from required public disclosure by section 3(a)(10). Pursuant to section 7(c), we have notified the third party whose proprietary interests may be compromised by disclosure of the requested information. In response, we have received a letter from LesMans Construction, Inc. LesMans contends that the requested information constitutes confidential commercial or financial information and is therefore excepted from required public disclosure by section 3(a)(10).

Section 3(a)(10) excepts from required public disclosure two types of information: 1) trade secrets and 2) commercial or financial information obtained from a person and privileged or confidential by statute or judicial decision. LesMans claims that the requested information is excepted from required public disclosure under the "commercial or financial information" branch of section 3(a)(10), but does not assert that the requested information constitutes a trade secret. Accordingly, we need only consider whether the requested information constitutes "commercial or financial information."

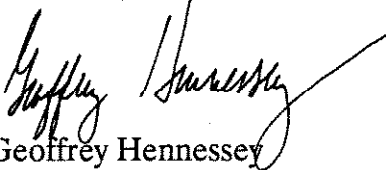
LesMans asserts that the requested information is excepted because its release would harm its competitive position and would undermine the school district's ability to obtain bidding information in the future. Open Records Decision No. 592 (1991) held that "[i]n order to be excepted from required public disclosure under section 3(a)(10) of the Open Records Act, 'commercial or financial information obtained from a person' must be 'privileged or confidential' under the common or statutory law of Texas." *Id.* at 9 (citing the summary). When an agency

or company fails to provide relevant information regarding factors necessary to make a 3(a)(10) claim, there is no basis to withhold the information under section 3(a)(10). *See* Open Records Decision No. 402 (1983).

We have examined the documents submitted to us for review. Neither the school district nor LesMans has demonstrated that the requested information is deemed privileged or confidential by law. Accordingly, the requested information may not be withheld from required public disclosure under section 3(a)(10) and must be released.

Because case law and prior published open records decisions resolve your request, we are resolving this matter with this informal letter ruling rather than with a published open records decision. If you have questions about this ruling, please refer to OR92-551.

Yours very truly,


Geoffrey Hennessey
Assistant Attorney General
Opinion Committee

GH/GCK/lmm

Ref.: ID# 15904
ID# 16359
ID# 17261

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